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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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STACEY KING,

Plaintiff,

v.

MUTUAL OF OMAHA INSURANCE
COMPANY,

Defendant.

Case No. 2:18-cv-01821-JCM-CWH

ORDER

13 Presently before the court is pro se plaintiff Stacey King's Motion to Strike Defendant's
14 Answer (ECF No. 5), filed on October 1, 2018. Defendant Mutual of Omaha Insurance Company
15 ("Mutual") filed a response and countermotion to set aside the default (ECF Nos. 7, 8) on October
16 11, 2018. King filed a reply in support of his motion and a response to the countermotion (ECF
17 Nos. 10, 11) on October 25, 2018. Mutual filed a reply (ECF No. 12) in support of its
18 countermotion on November 1, 2018.

19 **I. BACKGROUND**

20 This is an insurance-coverage dispute regarding long-term disability insurance benefits
21 that Mutual removed from state court based on diversity jurisdiction. (Pet. for Removal (ECF
22 No. 1). Mutual represents that shortly before removal, King filed an application for default in
23 state court that Mutual was unable to retrieve from the state court docket. (*Id.* at 3.) Regardless,
24 Mutual represents that it was not properly served through the Nevada Department of Insurance.
25 (*Id.*) After removal, Mutual filed an answer. (Ans. (ECF No. 4).) King subsequently filed the
26 notice of default that was entered in the state court case. (Notice of Default (ECF No. 6).) The
27 amended affidavit of service King filed with the court indicates Mutual was served by leaving a
28 copy of the summons and complaint with "Carla Engel" at "Mutual of Omaha Insurance

1 Company, c/o General Counsel, Mutual of Omaha Plaza, Omaha, NE 68175.” (Mot. to Strike
2 (ECF No. 5) at 8-9.)

3 King now moves to strike Mutual’s answer, arguing it is untimely because it was filed
4 after the default was entered in state court. Mutual responds that it was not properly served, that
5 its deadline for answering had not passed at the time it filed its answer, and that the state-court
6 default was based on the false assertion that Mutual was properly served and failed to respond.
7 Specifically, Mutual argues that Nevada statutory law requires foreign insurers to be served with
8 process through the Insurance Commissioner and that when service is made in the statutorily
9 mandated manner, the insurer gets an additional 10 days to answer. Mutual states that it is
10 formed under the laws of Nebraska and is thus a foreign insurer that may only be served through
11 the Insurance Commissioner. (Decl. (ECF No. 7-1).)

12 Mutual further argues it did not engage in culpable conduct that led to the default, that it
13 has a meritorious defense to the lawsuit, and that King would not be prejudiced by allowing the
14 case to be determined on its merits. Regarding its defense, Mutual provides the court with a
15 declaration from Greg Richt, one of its disability claims specialists, stating that Mutual terminated
16 King’s claim for long term disability benefits because he failed to submit information to support
17 further payment of his claim. (Decl. (ECF No. 7-1).) Mutual requests that the court set aside the
18 default and allow it to defend the case.

19 King replies that under Nevada Revised Statutes § 680A.250(4), service of process may
20 be made on a domestic insurer by serving the Insurance Commissioner or in the manner
21 prescribed under Rule 4(e) of the Nevada Rules of Civil Procedure. In its reply in support of its
22 counter-motion, Mutual states that service of process on a foreign insurer must be made through
23 the Insurance Commissioner and that the exception King references does not exist.

24 **II. ANALYSIS**

25 **A. Service**

26 Under Nevada law, foreign insurers must be served with process through the Insurance
27 Commissioner. “Before the Commissioner may authorize it to transact insurance in this state,
28 each insurer must appoint the Commissioner . . . as its attorney to receive service of legal

1 process issued against the insurer in this state.” Nev. Rev. Stat. § 680A.250(1). “Service of
2 such process against a foreign or alien insurer must be made only by service thereof upon the
3 Commissioner.” Nev. Rev. Stat. § 680A.250(3). Additionally, “[s]ervice of process against an
4 insurer for whom the Commissioner is attorney must be made by delivering to and leaving with
5 the Commissioner, the Commissioner’s deputy, or a person in apparent charge of the office of the
6 Commissioner during the Commissioner’s absence, two copies of the process, together with the
7 fee.” Nev. Rev. Stat. § 680A.260(1). When service is made in the statutorily mandated manner,
8 service is only complete when the Commissioner mails the papers to the insurer and then the
9 insurer gets an additional 10 days to answer. Nev. Rev. Stat. § 680A.260(2)-(3). “A ‘foreign’
10 insurer is one . . . [f]ormed under the laws of any jurisdiction other than [Nevada].” Nev. Rev.
11 Stat. § 679A.090(2)(a).

12 Here, Mutual’s declaration indicates it is a foreign insurer. King does not dispute that
13 fact. The amended affidavit of service King filed with the court indicates service was attempted
14 by leaving the summons and complaint with an individual at Mutual of Omaha’s office, not
15 through the Insurance Commissioner as required by Nevada law. Regarding King’s argument
16 that he had the option of serving Mutual under Nevada Revised Statutes § 680A.250(4) and Rule
17 4(e) of the Nevada Rules of Civil Procedure,¹ the plain language of § 680A.250(4) states that it
18 applies to domestic insurers. Regardless, application of Rule 4.2(c) also leads to the result that
19 service must be made through the Insurance Commissioner. Specifically, Rule 4.2(1)(A) states
20 that an entity registered to do business in Nevada may be served via its registered agent, by
21 various officers, partners, members, managers, or trustees that are not applicable here, or by “any
22 other agent authorize by appointment or by law to receive service of process.” To be registered to
23 do business in Nevada, Mutual was required to “appoint the Commissioner . . . as its attorney to
24 receive service of legal process issued against the insurer in [Nevada].” Nev. Rev. Stat. §
25 680A.250(1). Thus, Rule 4.2(1)(A) also requires service to be made on the Commissioner. The
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28 ¹ Former Rule 4(e) is now Rule 4.2(c).

1 court therefore finds that Mutual was not properly served under Nevada law and therefore will
2 deny King's motion to strike Mutual's answer.

3 **B. Clerk's entry of default**

4 Even if King had properly served Mutual, the court in its discretion would set aside the
5 state court clerk's entry of default. Rule 55 of the Federal Rules of Civil Procedure provides a
6 mechanism for obtaining a default judgment against a party who has failed to plead or otherwise
7 respond to claims brought against it. Where this failure is "shown by affidavit or otherwise," the
8 clerk must enter that party's default under Fed. R. Civ. Proc. 55(a). "The court may set aside an
9 entry of default for good cause." *Id.* at 55(c). "Good cause" is determined through three factors:
10 (a) whether the defaulting party engaged in culpable conduct that led to the default, (b) whether
11 there is a meritorious defense, and (c) whether reopening the case would cause prejudice to the
12 Plaintiff. *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). This test is disjunctive, and proof of
13 any of these three factors may justify setting aside the default. *See Brandt v. American Bankers*
14 *Insurance Co. of Florida*, 653 F.3d 1108, 1111 (9th Cir. 2011).

15 Overarching these factors is the Ninth Circuit's stated policy favoring adjudication of
16 disputes on their merits, *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986), with doubts
17 resolved in favor of setting aside the default. *Schwab v. Bullock's, Inc.*, 508 F.2d 353, 355 (9th
18 Cir. 1974). It is within the court's discretion whether to set aside a default. *O'Connor v. State of*
19 *Nev.*, 27 F.3d 357, 364 (9th Cir. 1994). The court's discretion is especially broad when it is the
20 clerk's entry of default that is being set aside, rather than a default judgment. *Id.*

21 Turning to the disjunctive *Falk* factors, the court finds King would not be prejudiced by
22 setting aside the default under the circumstances of this case. To determine whether the plaintiff
23 would be prejudiced if the default judgment is set aside, "[t]he standard is whether his ability to
24 pursue his claim will be hindered." *Falk*, 739 F.2d at 463. Setting aside a default must do more
25 than simply delay resolution of the case to be considered prejudicial to the plaintiff. *TCI*, 244
26 F.3d at 701. Similarly, requiring a plaintiff to adjudicate a claim on the merits does not constitute
27 prejudice. *Id.* Rather, the delay must result in some tangible harm, such as "loss of evidence,
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1 increased difficulties of discovery, or greater opportunity for fraud or collusion.” *Id.* (quotation
2 omitted).

3 Mutual’s motion to set aside the default was promptly filed within 10 days of King filing
4 the notice of default from state court and before there was any other significant activity in the
5 case. The parties have been proceeding as if the default were set aside by engaging in discovery.
6 Given the case’s procedural posture and the fact that discovery appears to be underway, setting
7 aside the default would not hinder King’s ability to pursue his case or result in excessive delay.
8 King does not identify any tangible harm he would suffer if default is set aside. Setting aside the
9 default also favors the Ninth Circuit’s policy favoring adjudication of the case on the merits. The
10 court in its discretion therefore finds that setting aside the default would not result in prejudice to
11 King. Having satisfied at least one of the three factors, the court need not proceed any further to
12 find that the state court clerk’s entry of default should be set aside. Accordingly, the court will
13 grant Mutual’s countermotion to set aside the default.

14 **III. CONCLUSION**

15 IT IS THEREFORE ORDERED that plaintiff Stacey King’s Motion to Strike Defendant’s
16 Answer (ECF No. 5) is DENIED.

17 IT IS FURTHER ORDERED that Defendant Mutual of Omaha Insurance Company
18 countermotion to set aside the default (ECF No. 7) is GRANTED.

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20 DATED: June 18, 2019

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24 C.W. HOFFMAN, JR.
25 UNITED STATES MAGISTRATE JUDGE
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